

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20, SUBREGION 37**

**HITACHI RAIL HONOLULU JV**

**Employer**

**and**

**Case 20-RC-269153**

**HAWAII TEAMSTERS AND ALLIED  
WORKERS, LOCAL 996**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Hawaii Teamsters and Allied Workers, Local 996 (Petitioner or Union) seeks by the instant petition to represent a bargaining unit of workers employed by Hitachi Rail Honolulu JV (Employer), located in Pearl City, Hawaii. On December 8, 2020,<sup>1</sup> the parties executed a stipulated election agreement (Agreement), which I approved that same day. In the Agreement, the parties stipulated to various matters, including the jurisdiction of the National Labor Relations Board (Board) over this matter, that Petitioner is a labor organization as defined by Section 2(5) of the National Labor Relations Act (Act), and that the following unit is appropriate for collective-bargaining purposes:

All full-time and regular part-time Train Controllers, Engineering & Fault Controllers, and Information Controllers, but excluding all other employees, business office clerical employees, professional employees, managerial employees, confidential employees, guards, and supervisors as defined by the Act.[<sup>2</sup>]

In the Agreement, the parties stipulated that I would exercise my discretion to direct either a manual election or a mail-ballot election after considering their position statements and data concerning, among other things, recent COVID-19 infection rates in the local area. The two options presented are to conduct a mail-ballot election, with ballots being mailed to voters at noon (Hawaii-Aleutian Standard Time) on December 21, and due back by January 11, 2021, or to conduct a manual election during two separate voting sessions on December 29. The parties were given until the close of business on December 10 to submit position statements setting forth their arguments to me in favor of one of these options. The Employer submitted a position statement in support of conducting a manual election, and the Petitioner did not submit a position statement.

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<sup>1</sup> All dates are in 2020 unless specified otherwise.

<sup>2</sup> The parties also stipulated that employees who are classified as Control Center Supervisors may vote in the election but that their ballots would be challenged because their eligibility has not been resolved.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. After carefully reviewing the Employer's position statement and applying the Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020), I have decided to direct a mail-ballot election in accordance with the details set forth in the Agreement.

### **METHOD OF ELECTION**

The COVID-19 pandemic has been a fact of life throughout Hawaii and the rest of the country for almost a year, and certain aspects of the pandemic have become well-known. It is axiomatic that COVID-19 is a potentially life-threatening respiratory illness for which there is a newly-approved vaccine, but one which is not readily available yet to the general public. Face coverings and social distancing have become the new normal to mitigate the spread of the virus. Additional mitigation, such as avoiding social gatherings, avoiding non-essential travel, and practicing good hygiene are reflected in guidance nationwide and locally.<sup>3</sup> As stated by the Centers for Disease Control and Prevention (CDC), "[t]he best way to prevent illness is to avoid being exposed to the virus." According to the CDC, "[t]he virus that causes COVID-19 is spreading very easily and sustainably between people" and "the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread."<sup>4</sup>

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election in "extraordinary circumstances," and the Board recognizes that the ongoing pandemic is indeed extraordinary. *Aspirus Keweenaw*, supra; citing *San Diego Gas & Elec.* at 1144-1145.

In making the decision to direct mail-ballot elections because of the extraordinary circumstances presented by the COVID-19 pandemic, Regional Directors have been mindful of the Board's longstanding policy that elections should typically be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.<sup>5</sup> To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General

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<sup>3</sup> CDC, Protect Yourself (updated November 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>4</sup> CDC, *How it Spreads* (updated October 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>5</sup> I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel), rather than the Board, and it is intended to provide guidance to regional personnel in the handling of representation cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

Counsel issued a memorandum, titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10 (GC Memo 20-10)*, setting forth detailed suggested manual election protocols. Some manual elections have been conducted consistent with these suggestions.

In *Aspirus Keweenaw*, *supra*, the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections, and outlined six situations to consider that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The Board ordered that this new guidance would be applied retroactively to all pending cases.

After careful examination of the Employer’s position statement and the current state of the COVID-19 virus in the City and County of Honolulu (Honolulu County), where the facility is located, I have determined that a manual election would present too great a risk to the health and safety of all participants in this election. Therefore, I am directing a mail-ballot election. I have made this determination because the trend in the number of new confirmed cases of COVID-19 in Honolulu County has increased during the latter part of the most recent 14-day period for which data is available. In reaching this decision, I have considered the six situations set forth in *Aspirus Keweenaw*, *supra*.

With regard to the first situation, I note that the Subregion 37 office is not currently in mandatory telework status. However, the second situation is present here and favors balloting by mail. The 14-day average positivity rate in Honolulu County has increased by 6% from November 28-December 11; the most-recent two-week analysis

period.<sup>6</sup> Although Honolulu County's website indicates that the average positivity rate has been at 2.3% for the past two weeks, the yo-yo figures show that positivity rates rose during the latter part of that two week period.<sup>7</sup> Indeed, the figures reflect dramatic increases and decreases on any given day, but that they have trended up as of late, and since November 28.<sup>8</sup> Notwithstanding the Employer's stated commitment to implement the safety measures set forth in *GC Memo 20-10* in an attempt to mitigate some of the risks associated with mass gatherings, the increase and volatility of the infection rates in Honolulu render a manual election unsafe, and I am therefore directing a mail-ballot election pursuant to the terms of the Agreement.

### **DIRECTION OF MAIL-BALLOT ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the appropriate unit set forth in the Agreement. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Hawaii Teamsters and Allied Workers, Local 996. Pursuant to the Agreement, employees who are classified as Control Center Supervisors may vote in the election but their ballots will be challenged because their eligibility has not been resolved.

The election will be conducted by mail ballot pursuant to the terms set forth in the Agreement. The mail ballots will be mailed to the voters from the office of the National Labor Relations Board, Subregion 37, at 12:00 noon (HST) on **DECEMBER 21, 2020**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 37 office by the close of business on **JANUARY 11, 2021**. In order to be valid and counted, the returned ballots must be received at the Subregion 37 office prior to the counting of the ballots.

**All ballots will be commingled and counted via Zoom Government on January 13, 2021 at 1:00 p.m. (HST).**

If any voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Subregion 37 office at (808) 541-2814 by no later than **DECEMBER 30, 2020**.

All other requirements concerning this election are as set forth in the Agreement.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this

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<sup>6</sup> <https://health.hawaii.gov/coronavirusdisease2019/what-you-should-know/current-situation-in-hawaii/#summary-metrics>

<sup>7</sup> <https://www.oneoahu.org/dashboard>

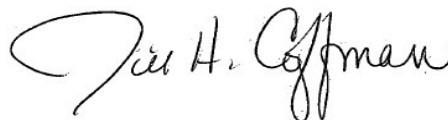
<sup>8</sup> <https://bao.arcgis.com/covid-19/jhu/county/15003.html>

Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Honolulu, Hawaii this 14<sup>th</sup> day of December 2020.



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Jill H. Coffman  
Regional Director  
National Labor Relations Board  
Region 20  
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